

United States  
Circuit Court of Appeals  
For the Ninth Circuit

THE PACIFIC MARINE SUPPLY COM-  
PANY and WEBB PRODUCTS CO.,  
INC.,

*Appellants,*

vs.

THE A. S. BOYLE COMPANY,

*Appellee.*

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REBUTTAL BRIEF FOR APPELLANTS

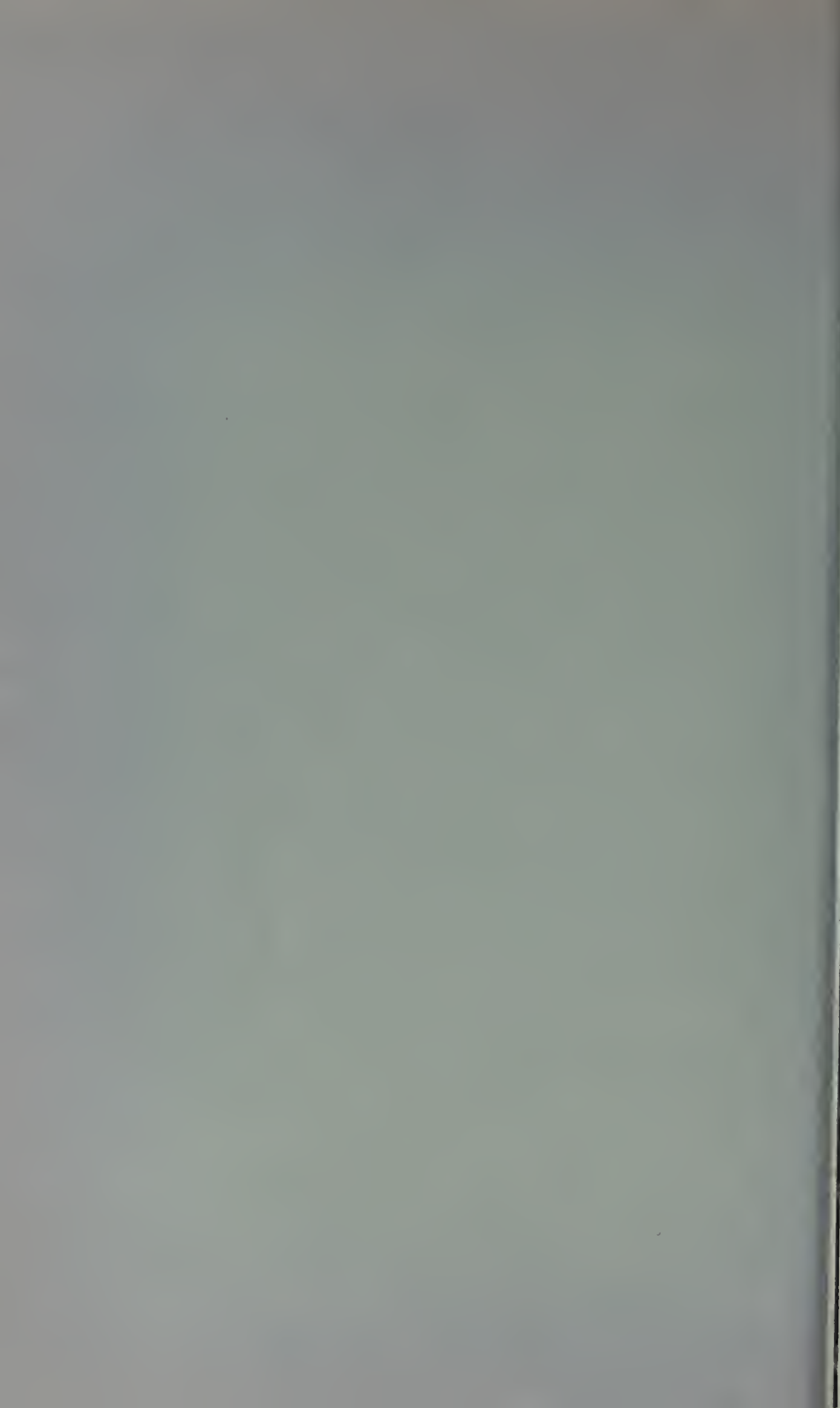
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Appeal  
No. 8876

REBUTTAL BRIEF FOR APPELLANTS

The appellee has devoted a large portion of its brief to a discussion of facts tending to indicate validity of the patent in suit, discussing primarily the fact that the appellee has made a considerable commercial success (appellee's brief, pp. 16-18), the fact that when appellee's product, Plastic Wood, was first placed on the market, certain witnesses did not know of any product which was sold for the same purpose to the trade (appellee's brief, pp. 18 and 19), that a large number of the uses for Plastic Wood have been developed (appellee's brief, pp. 19-21), and that a long period of time elapsed between the Pierson and Oblasser patents and the Griffiths patent (appellee's brief, p. 32.)

All of these considerations must fall to the ground when, as appears in this case, the Griffiths composition is completely anticipated by the prior art. Commercial success is not a substitute for invention or patentable novelty. *Premier Machine Company, Inc. v. Freeman*, 84 F. (2d) 425, C. C. A. 1:

“Commercial success if shown to be attributable only to the thing patented may be very significant when the question of invention is close, and especially when there is evidence of previous attempts to solve the problem which were unsuccessful; *but it is by no means the equivalent of invention*. And when invention is clearly absent it is the duty of the courts to say so no matter what degree of commercial success may have been attained. In *Paramount-Publix Corp. v. Am. Tri-Ergon Corp.*, 294 U. S. 464, and *Altoona Publix Theatres v. Am. Tri-Ergon Corp.*, 294 U. S. 477, enormous commercial success was held not to be the equivalent of invention.”

Nor does the fact that certain witnesses were unfamiliar with all of the prior art deny the existence of prior art or militate against anticipation. Likewise, the fact that a large number of uses have been developed for Plastic Wood which are not set forth in the Griffiths patent does not establish patentable novelty or invention, nor does it even prove that the compositions of the prior art are not susceptible of the same uses.

The appellee also points to various litigations involving the Griffiths patent. In *Griffiths v. Robertson, Commissioner of Patents* referred to at pages 22 and 23 of appellee's brief the Court did not even have the Pierson and Oblasser patents before it. (R. 190 and 191.)

At the top of page 24 of appellee's brief, the appellee refers to three suits settled out of court by consent. Such consent decrees do not establish invention or patentable

novelty, but instead merely a desire on the part of the defendants therein to avoid litigation.

In *Boyle v. Harris-Thomas Co.*, referred to at the bottom of page 24 of appellee's brief, the opinion of which is quoted in the appendix, it appears that the defendants therein engaged in questionable strategy by placing in evidence some eighty-five patents and several excerpts from textbooks and publications (appellee's brief, p. 56) with the probable result that the trial judge concluded that if it was necessary for the defendants to rely upon such an unreasonable number of references that this indicated the presence of invention rather than the lack of it. It does not appear from the opinion that whether the Pierson and Oblasser patents were included in the eighty-five or not.

All of these various considerations referred to by the appellee at pages 16 to 26 of its brief are valueless when, as here appears, the Pierson and Oblasser patents completely anticipate the Griffiths claims.

Antiquity of the Pierson and Oblasser patents does not mitigate against their being anticipations.

### **The Pierson Patent Discloses the Making of a Putty-like Composition From Nitrocellulose, Volatile Solvent, and Wood Flour Which on Hardening Would Become Essentially a Grainless Wood.**

The Pierson patent discloses making up a plastic composition consisting of nitrocellulose, one part; a solvent composed of four parts, each of alcohol and ether; and filler from one to sixteen parts, or 10 to 64%. The filler may be lamp black, plumbago, charcoal powder, sawdust, straw, or any vegetable powder or fiber. In the Griffiths patent in suit, on the other hand, the filler instead of being specified as lying between 10% and 64%, lies between 15% and 30% although

“proportions outside of these limits may be employed.” (Ex. Bk., p. 1, ll. 61 and 62.)

It is the appellant's contention that all that Griffiths did was to reduce or narrow down the wide limits of Pierson. Pierson, on account of having suggested so many different types of fillers, naturally specified the use of a wide range. Griffiths, on the other hand, was dealing with only a few fillers, the preferable one being wood, although, as stated Exhibit Book, page 2, line 2, “any suitable filling material may be used.” The appellee says (appellee's brief, page 27) that the appellant's argument

“is fallacious because it assumes that a person skilled in the art would know that by putting together nitrocellulose, volatile solvent and wood flour, he could make putty which on hardening would become essentially a grainless wood. The Griffiths invention lay primarily in his conception that such a material could be made. Appellant's argument assumes a knowledge of Griffiths' concept.”

At page 29 of appellee's brief, appellee states:

“As already stated Griffiths' fundamental concept was of a doughy putty-like material which could be handled like putty and which, on hardening by mere exposure to the air, would become practically a grainless wood. Griffiths pictured such a material and that it could be made from wood flour held together by nitrocellulose. He was the first to conceive the possibility of making a putty which would turn into a grainless wood and of making it from these well-known materials.”

We propose to reply to these statements and to demonstrate that Pierson did have the same identical concept because it is inherent in the composition that is disclosed in his patent.

As to producing what would become a grainless wood, attention is invited to the fact that nowhere in Griffiths'



specification is there any disclosure of producing a grainless wood. In fact, if other "suitable filling materials may be used" (Ex. Bk., p. 2, ll. 2 and 3) besides wood flour as suggested in the Griffiths patent, not even an artificial wood would be produced but instead a composition possessing properties of the filler selected. It is true that Griffiths' composition will, if a wood filler is employed, produce something resembling wood which is grainless. This is inherent in his composition. But it is also equally inherent in Pierson. Pierson discloses the same materials, to wit, nitrocellulose, volatile solvent, and finely divided wood in such proportions as to be moldable so as to be capable of forming statuary and mouldings, and his materials will produce a grainless wood just as much as the Griffiths' composition. The defendant's expert Roller testified (R., 271):

"Q. Do you know whether these compositions which are described in Pierson and Griffiths are suitable for making something to represent carved wood?

"A. Yes, *any of these plastics, using the ground wood filler of the kind of wood you wish to imitate will take the figuration of any carved moulding and in that way represent an imitation wood, lacking only the grain that a wood would show.*"

In other words, it was just as inherent in the Pierson composition when wood flour was employed that the resulting product should resemble a grainless wood, as in the Griffiths patent. In fact, the Pierson patent so states. Claim 1 of the Pierson patent (Ex. Bk., p. 72) reads:

"*The formation of articles of manufacture resembling stone, wood, whalebone, shell, horn, and other rigid or elastic articles out of plastic or semi-soluble pyroxyline prepared substantially in the manner and for the purposes herein set forth.*"

Pierson thus recognized and had the conception of forming an article resembling wood when he used sawdust, vegetable powder, or fiber as his filler. He so claimed it. To argue that Pierson failed to conceive of producing a grainless wood is contrary to the evidence. He not only had this in mind, but his composition being the same as Griffiths, would necessarily produce the same product inherently.

The appellee also argues that Pierson did not have the conception of making a "putty" from these ingredients, nitrocellulose, solvent, and wood flour filler. The question then is, what is the definition of a putty? Not once in Griffiths' specification does the word "putty" appear. Presumably, the appellee argues, that any composition wherein the filler was between 15 and 30% is a putty and that a composition even outside these limits is a putty, as suggested. (Ex. Bk., p. 1, ll. 61 and 62.) Pierson suggests using a filler content of 10% to 64% depending upon which of his fillers is selected. If a composition containing from 15 to 30% filler, or having filler present outside these limits, can be designated as "doughy" or "putty-like," certainly the same is true of a composition where the filler content is between 10 and 64%. The question also arises as to what is meant by the term "doughy." Not once in Griffiths' specification does this word appear. Does this refer to a consistency such as cake dough which can be poured, or does it refer to a consistency such as that of macaroni dough which is so stiff that it can only be worked and extruded into macaroni by means of powerful machines, or on the other hand, does it refer to a consistency of bread dough. As neither the words "doughy" or "putty-like" appear in Griffiths' specification, these words in Griffiths claims must be construed as synonymous with "moldable." Defendant's expert Roller testified (R., 264, 265):

“Q. Well, suppose you take the formula given there with the low limit for the filler; that would be one part plastic; alcohol, 4; ether, 4; charcoal powder, 1 part, or sawdust powder one part. That would be a liquid, wouldn't it?

“A. It would be a pretty heavy liquid.

“Q. You said before, doctor, it would be a soupy liquid.

“A. I don't think it would be as thin as soup. I think it would be near the order of honey.

“Q. And if you took sixteen parts of filler, would the material stick together?

“A. It might if you used considerable pressure.

“Q. But not without pressure?

“A. It would require pretty heavy pressure, I believe almost more than you could apply by squeezing it in your hands.”

Now, if a mechanic were proposing to make up a molding or some statuary, which are the purposes stated by Pierson in the middle paragraph of column 1, Exhibit Book, page 72, the only obvious thing for him to do would be to endeavor to arrive at something between these two extremes. If he were making a molding or piece of statuary he would not want his composition as thin as honey, this being the lower extreme, nor would he want it so thick as to require a heavy pressure to cause the material to stick together. Instead, the obvious thing would be to endeavor to strike some happy medium between these two extremes wherein the composition could be molded into the desired shape with very little effort and yet would not be so thin or honey-like as to be incapable of holding its own shape. Roller testified (R. 270):

“Q. Referring to the next paragraph which opposing counsel has designated as paragraph 4c, of what consistency is this composition to be when he is going to use it for making statuary and mouldings as stated in that paragraph in the last few lines?

“A. Of the same consistency that he would have used the materials in the preceding paragraph; in other words, a paste.

“Q. Would you say a putty?

“A. I wouldn't say ‘paste.’ I think you (would) have a putty or a moulding clay which is of the consistency of putty.

“Q. In this Griffiths patent, the patent in suit, he mentions here that his material is to be used for ‘filling, coating or moulding’ in the first paragraph, lines 4 and 5. Is there anything in this Pierson patent, paragraph 4c, that indicates to you that the composition is to have the same consistency for moulding as the Griffiths composition when it is used for molding?

“A. No. They both speak of them for moulding; and moulding materials all have the same consistency before they can be used as such.”

It should thus be clear that not only did Pierson conceive of making a plastic composition which when hardened would resemble wood and inherently be grainless, but that he also conceived of having the material moldable and therefore “doughy” or “putty-like.”

To answer the appellee's summary as to the Pierson patent appearing on page 31 of appellee's brief, we submit:

(1) Pierson does teach the possibility of a grainless wood because he claimed in claim 1 the making of articles resembling wood which inherently would be grainless.

(2) Pierson does give a formula and direction for making such a material. He states the quantity of nitro-cellulose to use, the kind and quantity of solvents to use, and the kind of fillers to use including finely divided wood, specifying a range of filler percentages running somewhere between 10% and 64%.

(3) No experimentation is necessary to produce a moldable composition under the Pierson disclosure. All that is necessary is to mix up the nitrocellulose and solvent and then add between 10% and 64% of whatever filler you select until you secure the desired consistency for molding. Some molders may prefer the composition thicker or stiffer than others. They can do as they like.

The appellee urges that it was necessary for Webb and Roller to make a series of experiments with what was disclosed in the Pierson patent before they secured the desired results. This is a misinterpretation of the testimony. As testified by Roller (R. 248):

“Q. Why did you use different proportions of filling material?”

“A. Simply to show the difference in effect of the various relations between the filler and the mineral and the solvents, and the fluidity of this particular nitro-cellulose that was being used.”

Webb testified (R. 298):

“The reason for making this variation was in following these patents there was some variation called for and we wished to demonstrate the effect that the variation of the solvents would have.”

In other words, as Pierson specified a filler content of between 10 and 64%, the defendants made a number of specimens to show that the variation of the filler content was not only optional but that mere increase or decrease

of the filler content would not produce any sharp departure or change in the nature of the composition. Specimens were also made to show that the presence of oil and that the presence of the resin made no sharp departure or change in the composition and that their use was therefore optional and immaterial.

The appellee has argued strenuously that the Pierson patent should not be regarded as an anticipation because Pierson did not have "Griffiths' *fundamental concept*" "of a doughy, putty-like material which could be handled like putty and which on hardening by mere exposure to air would become practically a grainless wood." (Appellee's brief, page 29.) Again on page 27 of appellee's brief they argue:

"The Griffiths invention lay primarily in his *conception* that such a material could be made."

Compare these statements with the statement appearing on page 35 of appellee's brief as follows:

"What Griffiths may have had in his mind when he made his invention is now of no importance."

There are some other interesting statements in appellee's brief. Appellee states, page 48:

"The man skilled in the art can tell from the Griffiths' *claims* what proportions of nitrocellulose, solvent, and filler are needed to give the doughy, putty-like characteristic to the composition, and which will harden into the solidity of wood upon mere exposure to the air."

The Griffiths' claims involved in this appeal state nothing about what these proportions shall be other than the characteristics mentioned in the above statement. If it is true as appellee contends that a man skilled in the art could gain all of this information from the Griffiths' *claims*, then

appellants contend he could gain the same information also from Pierson and Oblasser.

The appellee also states (appellee's brief, p. 48):

“Once an inventor of a new composition has shown in his disclosure how his new composition can be made, it will at once become clear to others familiar with the art that many different proportions can be used, with varying and useful results in the final product.”

We accept this statement but insist that it applies to the Oblasser and Pierson disclosures just as much as it does to Griffiths. Anyone familiar with the Oblasser and Pierson disclosures would immediately know “that many different proportions can be used, with varying and useful results in the final product.” All that Griffiths did was to select a particular proportion within the range taught by Pierson and Oblasser and pretend that he had made an invention. This pretention, while made in the United States, was not even asserted in Griffiths' home country, England, for he made no attempt to secure a patent on his composition in that country.

Griffiths' mere selection of proportions—the mere narrowing down of Pierson's range from 10 to 64% to 15 to 30% is not invention. As said in *Zenitherm Company, Inc. v. Art. Marble Company*, 56 Fed. (2d) 39 (C. C. A. 5):

“The materials, their mixture and pressure being thus old, no proportion of ingredients nor degree of pressure is disclosed by Sutter or particularly claimed by him as producing any new or surprising result. If he discovered any such, he kept silent about it. The increase of any of them to increase their usual effect is not invention. *Finley v. MacDougal Const. Co.*, 28 Fed. (2d), 674.”

Likewise here, not only was Griffiths silent about producing a grainless wood but he was also silent about producing a putty. All proportions between 15 and 30% and even proportions outside these limits were indicated suitable. And as far as Griffiths' claims were concerned—there was no limitation on the proportions whatever except that the composition before hardening was to be moldable and after hardening was to resemble wood. The Pierson composition, as stated in the patent, was to be moldable to produce "statuary and mouldings," and when hardened was to resemble wood as stated in claim 1 of Pierson's patent.

Appellee, at pages 33 to 36 of its brief, seeks to distinguish the various other patents relied upon to show the development of the art. If these patents are distinguishable as contended by appellee, this merely goes to establish that Judge Luhring, who reversed the Patent Office and granted the Griffiths patent, did not have the best prior art before him. He merely considered the patents that appellee now seeks to distinguish and was not advised of the Pierson and Oblasser patents. His opinion reversing the Patent Office under these circumstances, is entitled to no weight whatsoever.

The distinctions pointed out by the appellee however concern merely the nature of the fillers used. Merrick (Ex. Bk. 73) uses cork and asbestos fiber, and suggests the use of wood. Black (Ex. Bk. 91) uses silica. Eckstein (Ex. Bk. 93) uses zinc white or heavy spar. Hyatt & Blake (Ex. Bk. 115) uses ivory dust. Bulling and Reese (Ex. Bk. 130) use calcium chloride and plaster of paris. These distinctions as to the kind of filler used *supra* are of little concern. As said in the *Zenitherm* case, *supra*:

"On the question of novelty not only may direct anticipation and known practice in the particular art be looked to, but also the knowledge and practice in



related arts, for it requires no invention to adapt such from one to another of such arts. (Citing cases.) *The art of making artificial wood and artificial stone, and even of making and molding brick and concrete are such allied arts.*”

That these various patents are from closely related arts if not from the same art is established by the Pierson and Oblasser patents themselves. Thus, Pierson discloses making what amounts to plastic stone, plastic wood, plastic whalebone, plastic shell, plastic horn, “and other rigid or elastic articles.” He recognized that the only difference was in the nature of the filler used. Likewise Oblasser contemplated a plastic agglomerate which might have as the filler not only sawdust but asbestos, pounded glass, sandstone, metallic powders, pulverized carbon, etc. Griffiths, himself, recognized the same relation for in his laboratory notebook he contemplated plastic leather (Ex. Bk. 40 and 43); a wood stopping employing starch as the filler (Ex. Bk. 41); plastic carborundum (Ex. Bk. 42), and a filler employing plaster of paris similar to the Bulling and Reese patent (Ex. Bk. 42). Not only did Oblasser and Pierson anticipate Griffiths, but Griffiths made no invention over the balance of the prior art as was held by the Board of Appeals in the Patent Office before the case was reviewed by Judge Luhring.

### **The Oblasser Patent Likewise Anticipated Griffiths**

The appellee complains that the Oblasser patent fails to give any proportions. This is hardly true. The Oblasser patent (Ex. Bk. 82) describes nitrating cellulose to produce nitrocellulose. The nitrocellulose is then dissolved in one of a number of solvents, such as acetone, to form a coating. It is stated that the coating is applied “with a brush, a

spatula, a roller or by any other means.” (Ex. Bk. 82, ll. 46 and 47.) This would indicate to add enough solvent to secure the desired consistency for application depending upon whether a brush was to be used, a spatula, or a roller. Naturally one would desire a thinner coating when applying it with a brush than with a spatula.

Oblasser then proposes making an agglomerate from the coating “susceptible of being moulded.” This would mean to add any of the filling substances such as sawdust, cork waste, cork powder, etc. mentioned in the patent, until the desired consistency was obtained for purposes of moulding. When the agglomerate is obtained

*“instead of rendering a receptacle of wood or other material tight by the application of our coating we may manufacture it directly by moulding, use being made of the said agglomerate.”* (Ex. Bk. 83.)

The agglomerate therefore was to be used to produce a substitute for wood. A mechanic could certainly arrive at the proper proportions for a moldable corporation with these directions.

The plaintiff-appellee’s expert Esselen sought to distinguish the Oblasser patent by reading into it limitations that it does not contain. He criticizes in the quotation made in appellee’s brief, pages 31 and 32, the use of the agglomerate to make up an open-ended battery box, and suggests that heat and pressure probably were necessary. There is nothing in the Oblasser patent specifying that heat or pressure were used or were necessary. But even if pressure was used with Oblasser’s composition, how does this distinguish from Griffiths? At Exhibit Book, page 2, Griffiths gives a composition (ll. 11 to 20) and then states:

*“This mixture is particularly useful for pressing or moulding.”*

Again, on the same page, another formula is given (ll. 28-36), and then he states:

“This mixture also is particularly useful for *pressing* or moulding.”

Thus, the Griffiths patent itself contemplated the use of pressure. Oblasser, on the other hand, makes no mention of the use of pressure or of the use of heat. If he did use pressure, this is exactly what Griffiths himself contemplated in the above-quoted statements.

The fact remains that both Pierson and Oblasser anticipated Griffiths in the conception of making up a moldable composition that was to form something resembling wood which consisted of mixing up nitrocellulose, solvent, and finely divided cellulose such as sawdust or other vegetable powders. The consistency of the Pierson and Oblasser compositions was to be the same as Griffiths because they were to be used for molding; so was Griffiths' composition.

The District Judge in the case of the A. S. Boyle Co. v. Harris-Thomas Company, quoted in the appendix to appellee's brief, page 57, noticed:

“In one or two instances at least, inventors have mixed nitrocellulose with sawdust to make artificial wood.”

This finding militates against the appellee's present argument that Griffiths was the first to conceive of making artificial wood from nitrocellulose, a solvent, and sawdust. See also Ex. A30. (Ex. Bk. 144 and 145-146.) The District Court in that case, however errs in the statement on the same page:

“that nobody thought of making it available in the workshops and in the home in the form of a convenient putty for repairs to articles made of wood.”

There is nothing in the Griffiths patent that teaches how to make the composition available in the workshop and in the home in the form of a convenient putty for repairs that is not equally taught in the Pierson and Oblasser patents. It is not even stated in the Griffiths' patent that the composition should be kept canned or that it should be sold in tubes or that supplies of solvent should be kept for thinning the composition when it became too thick. This was done by the plaintiff when it began selling Plaster Wood and making it available for home use, but it is not disclosed in the patent. The District Judge thus erred in that case in assuming that Revised Statute 4886 justified the granting of a patent to someone who undertook to exploit an old and well-known composition by making it available in the workshop and in the home. R. S. 4886 does not provide for granting a monopoly for this accomplishment but only for the development of new and useful inventions whether they are made available in the workshop or in the home or not. As Griffiths failed to make an invention that was not disclosed in the Pierson and Oblasser patents his patent should be declared invalid.

The foregoing argument is directed at claims 5 and 17. Claims 8, 13, and 16 merely differ therefrom by reciting the use of a non-drying oil, the use of acetone as the solvent, and the use of a resinous body, such as ester gum. The appellee has not urged in its brief that these claims should be held valid because of these limitations. In fact, appellee could hardly do so in view of the fact that its own expert Esselen conceded that acetone was a well-known substitute solvent for Pierson's solvent; that the use of castor oil in compositions of this character was well known and produced merely its expected function in the Griffiths' composition and that the use of ester gum in compositions of this character was also well known and merely produced

its expected functions. Claims 8, 13, and 16 thus are not patentably different from claims 5 and 7 and should fall therewith.

### The Decision of General Electric Company vs. Wabash Appliance Company

In the above case, which appellee seeks to distinguish, the claims were for a tungsten filament which, if they differed at all from prior tungsten filaments, differed merely in reciting “grains of such size and contour as to prevent substantial sagging and offsetting during a normally or commercially useful life.” The Circuit Court of Appeals for the Second Circuit had held the product anticipated. The Supreme Court, however, found it unnecessary to determine whether the tungsten filament was anticipated or not, and held the claims invalid on their face for failure to comply with Revised Statute 4888. We believe that the doctrine of that case applies here to the phrase in the Griffiths’ claims

“*in such proportions as to harden upon mere exposure to air to substantially the rigidity and solidity of wood.*”

But regardless of how Griffiths’ claims are worded or might be worded, they are invalid because they are anticipated by the Pierson and Oblasser moldable compositions of the same ingredients which were designed to produce the same type of artificial wood. These claims are not only invalid on their face under the doctrine of the above decision, but in addition, they are clearly and positively anticipated by prior art which was not before Judge Luhring who reversed the Patent Office.

## Conclusion

Griffiths' composition is old. He merely revived at the end of the World War what was old in Pierson and Oblasser as a means for using up nitrocellulose that the Explosives Company he was then working for was producing and which they no longer had a market for when the War ended. He disclosed using his composition for "coating, filling, and moulding." While the plaintiff and its predecessors have developed uses that Griffiths did not contemplate, they could have done the same with Pierson's composition as well as Griffiths'. They elected Griffiths because of the fact that a patent was granted to Griffiths, even though erroneously, and this they could use to intimidate competition.

Griffiths' composition was not new. The charge that the defendants availed themselves of what Griffiths gave to the world is contrary to the evidence which shows that the defendant's composition was developed by the intervener independently of the Griffiths' disclosure and that it is a wide departure from what is disclosed in the Griffiths' patent. Griffiths' claims are so broad that if they cover the defendant's compositions, they also cover the Pierson and Oblasser compositions and are thus anticipated by them. No *ex post facto* wisdom is necessary to read and understand the Pierson and Oblasser patents and to produce the same moldable composition therefrom. These claims of the Griffiths' patent should be struck down as invalid.

A reversal of the District Court is urged.

Respectfully submitted,

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